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No. 04-831

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY and MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Petitioners,

v.

KELLI SMALLWOOD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

CHARLES TERRY OZIER
WILLIAM B. LOVETT, JR.
WISE CARTER CHILD & CARAWAY, PA
401 East Capitol Street
Post Office Box 651
Jackson, Mississippi 39205
(601) 968-5500

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

KELLY D. SIMPKINS
WELLS MARBLE & HURST PLLC
317 East Capitol Street
Jackson, Mississippi 39201
(601) 355-8321

Counsel for Petitioners

* Counsel of Record

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INTRODUCTION

Respondent correctly points out that (i) "more than eighty years . . . have passed since the Court last squarely addressed the subject of fraudulent joinder," Opp. 2; (ii) since that time, "the contours of the doctrine have blurred and its scope has expanded dramatically," *id.*; (iii) it is "commonplace for federal courts to find fraudulent joinder based on . . . an allegation . . . that simply attacks the merits of the plaintiff's claim for relief against diverse and non-diverse defendants alike," *id.*; and (iv) there is "confusion surrounding the . . . doctrine." *Id.* at 21. Together, these admissions – the long interlude without this Court's guidance and the resulting confusion about an important rule of federal procedure – add up to a strong case for this Court's review.

Although respondent argues at length that the decision below does not conflict with decisions of this Court or other courts of appeals, her brief reflects the current conflict by describing the lower courts' expansion of and confusion about this Court's fraudulent-joinder jurisprudence. The lower courts are, in fact, divided about the appropriate fraudulent-joinder test to derive from this Court's precedents, and have adopted conflicting tests. And, as a recent comment makes clear, the decision below misapplies this Court's cases and embraces a rule that is both wrong and damaging. See *Recent Cases*, 118 Harv. L. Rev. 1086, 1090-93 (2005).

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE COURTS OF APPEALS.

A. The Circuits Are In Conflict.

The traditional test for fraudulent joinder is "whether the defendant has demonstrated that there is no possibility of

recovery by the plaintiff against an in-state defendant." App. 5a. There is no "common defense" exception to this rule when there is no possibility of recovery against the out-of-state defendant for the same reason. Instead, it was the Third Circuit that in 1990 – 70 years after this Court last addressed fraudulent joinder – discovered the "common defense" exception to the fraudulent-joinder rule. See *Boyer* v. *Snap-On Tools Corp.*, 913 F.2d 108, 113 (3d Cir. 1990). The court below expressly followed the Third Circuit's lead, rejecting the contrary position of the Ninth Circuit. See App. 9a & n.24. Notwithstanding her admission that it is "commonplace for federal courts to find fraudulent joinder based on an . . . allegation . . . that simply attacks the merits of the plaintiff's claim for relief against diverse and non-diverse defendants alike," Opp. 2, respondent inconsistently insists that the "common defense" rule does not conflict with decisions of other circuits. This changeable rhetoric does not alter reality.

First, the Fifth Circuit itself cited *Ritchey* v. *Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998), as reflecting the Ninth Circuit's refusal to read this Court's decisions as the Fifth and Third Circuits had. App. 9a n.24. See also *id.* at 48a n.49 (*Ritchey* "supports [defendants'] argument. There the Ninth Circuit found fraudulent joinder because the claims against the nondiverse defendants were barred by the statute of limitations. It did so despite the fact that the same statute of limitations defense applied to bar the claim against the diverse defendant.") (citation omitted). Clearly, the Fifth Circuit understood that it was bringing itself into conflict with the Ninth Circuit. See also Opp. 15-16 ("[t]he court below seems to have believed mistakenly that its en banc decision is in conflict with the *Ritchey* decision"). Other courts reading the decisions following this dramatic en banc split-decision in the Fifth Circuit will similarly conclude that they must choose between two competing rules regarding fraudulent joinder.

Second, respondent's excruciating effort to distinguish *Ritchey* is wholly without merit. She claims that the

"common defense" in *Ritchey* was a statute-of-limitations defense; that this limitations defense was a procedural not a substantive defense; and that *Ritchey* accepted the "common defense" exception to the rule of fraudulent joinder, but did not apply that exception to common procedural defenses. This is a tortured and absolutely incorrect reading of *Ritchey*.

In fact, *Ritchey* rejects the "common defense" exception, holding that the plaintiff "did not state a cause of action against anyone," and that "his failure to state that cause of action against [the in-state defendants] demonstrates beyond peradventure that [the in-state defendants] were sham defendants for purposes of removal." 139 F.3d at 1320. *Ritchey* thus recognizes that if a plaintiff fails to state a claim against the in-state defendant (even if for the same reason that plaintiff fails to state a claim against the out-of-state defendant), the in-state defendant has been fraudulently joined. See also *id.* at 1318.

Ritchey's analysis, which respondent wrongly cites for the proposition that there is a procedural-defense exception to the "common defense" rule, in fact, addressed a totally different question – whether the fraudulent-joinder doctrine applies not only to a plaintiff's failure to state a claim, but also to a valid defense. The court concluded that it need not "resolve th[e] issue" whether the doctrine of fraudulent joinder mandated dismissal of an in-state defendant where the defendant had a valid defense, *id.* at 1319, because under California law, a valid statute of limitations defense means that "no cause of action was stated," making a limitations defense just like a failure to state a claim. *Id.* at 1320. The court never suggested, however, that fraudulent joinder turned on whether the same defense would also bar the claim against the out-of-state defendant. To the contrary, the court held that the in-state defendants were fraudulently joined based on the "common defense." Thus, *Ritchey* stands in stark conflict with the decision below and *Boyer*.

Finally, respondent does not dispute that the holding of *LeBlang Motors, Ltd.* v. *Suburu of America, Inc.*, 148 F.3d 680, 691-92 (7th Cir. 1998) – finding fraudulent joinder even though there was a "common defense" – cannot be reconciled with the decision below. But, respondent says, the Seventh Circuit did not expressly discuss this issue and is not bound to adhere to the decision. It is, of course, for the Seventh Circuit to determine the extent to which *LeBlang*'s holding applies in like circumstances. But, plainly, *LeBlang*'s holding is consistent with *Ritchey* and contradicts *Boyer* and the decision below, further evincing the confusion and disarray in the lower courts on the scope of the fraudulent-joinder rule.

B. The Courts Of Appeals' Interpretations Of This Court's Fraudulent-Joinder Precedents Conflict.

Respondent has correctly identified both the lower court's confusion and its source – the fact that this Court has not provided guidance about the scope of the fraudulent-joinder doctrine in almost 80 years. In fact, this Court's cases were focused on assessing whether the plaintiff was seeking improperly to avoid federal jurisdiction, while the modern rule uses the objective merits of the plaintiff's claim as a proxy for such an improper intent to avert a lengthy inquiry into the plaintiff's subjective state. See *Recent Cases*, *supra* at 1090-91. Once this progression is understood, it becomes evident that the Court's older precedent did not address the "common defense" issue; that, as a result, the lower courts are in conflict about the application of this Court's cases to the objective fraudulent-joinder inquiry; and that this Court's guidance is sorely needed today.

Moreover, respondent's claim that the "common defense" exception to the fraudulent-joinder rule can be found in this Court's cases is simply wrong. Respondent erroneously claims that under the objective test, an in-state defendant is fraudulently joined if the defendants "traverse" or dispute the factual allegations of the plaintiff's claim. Having set up this straw man, respondent "proves" that this Court has *not* found

fraudulent joinder where the plaintiff can state a valid claim against the in-state defendant and defendants simply dispute the plaintiff's factual allegations. That point is, however, wholly irrelevant; the objective test for fraudulent joinder asks not whether the defendant traverses the facts alleged, but *whether the plaintiff can state a valid claim.*

The Court first articulated the fraudulent-joinder doctrine in *Wecker* v. *National Enameling & Stamping Co.*, 204 U.S. 176 (1907). There the plaintiff sued two in-state coworkers and his out-of-state employer under state law for an employment-related injury. The court authorized removal despite the apparent absence of diversity because the facts "showed conclusively" that the plaintiff had joined the in-state employees in "an attempt to defeat" federal jurisdiction. *Id.* at 184. Following *Wecker*, this Court continued to focus on the plaintiff's subjective intent in assessing whether the in-state defendant had been fraudulently joined. See, *e.g.*, *Pullman Co.* v. *Jenkins*, 305 U.S. 534, 541 (1939) ("[i]t is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith").

None of the cases cited by respondent uses an objective test to determine the plaintiff's improper intent to evade federal jurisdiction; and, *a fortiori*, none supports a "common defense" exception.

In *Southern Railway* v. *Lloyd*, 239 U.S. 496 (1916), the plaintiff filed claims under the Federal Employers' Liability Act against both out-of-state and in-state defendants; the out-of-state defendant claimed that the plaintiff had no claim against the in-state defendant because "the plaintiff was not engaged in interstate commerce at the time of the accident." *Id.* at 498. This Court found that the claim of fraudulent joinder amounted to only a "traverse" or denial "of the facts" the plaintiff alleged, and was an attempt to try the merits of "a cause of action, good upon its face." *Id.* at 500. The Court explained that "[i]t is only in cases wherein the facts alleged in the petition for removal are sufficient to fairly raise the

issue of fraud that the state court is required to surrender its jurisdiction." *Id.*

In *Southern Railway*, accordingly, the Court was not addressing the issue of fraudulent joinder based on an allegation that the plaintiff could not establish a cause of action against the in-state defendant. The out-of-state defendant was *contesting the factual allegations* of the plaintiff's claim against the in-state defendant. Moreover, the Court was not applying an objective test; it was looking for facts sufficient "to fairly raise the issue of *fraud*." *Id.* (emphasis supplied). Finally, the Court had an alternative ground for its decision – that removal based on diversity is not permitted in FELA cases. Plainly, this case does not stand for, and cannot be cited as, an endorsement of a "common defense" exception to the fraudulent-joinder rule.

Petitioner (with reliance upon Judge Jolly) has already explained in detail why *Chesapeake & Ohio Railway* v. *Cockrell*, 232 U.S. 146 (1914), cannot bear the weight respondent and the Fifth Circuit majority try to place upon it. See Pet. 12-14. In response to respondent's argument that this case supports a "common defense" exception, however, it is critical to note that, as in *Southern Railway*, the Court was focused not on the objective merits of the plaintiff's claim against the in-state defendants, but instead on the question whether the plaintiff had filed that claim in "good faith" or whether the plaintiff's allegations "show[ed] a fraudulent joinder." 232 U.S. at 153. And, again as in *Southern Railway*, the out-of-state defendant was merely contesting the factual allegations of the claim against the in-state defendant, not claiming that the plaintiff could not state a valid claim against the in-state defendant. Finally, the plaintiff's claim against the employees was not a sham, but was instead

necessary for the disposition of the plaintiff's *respondeat superior* claim against the employer. *Id.*[1]

That leaves respondent with *Illinois Central Railroad* v. *Sheegog*, where a plaintiff alleged that an out-of-state railroad and an in-state railroad and co-worker had been negligent in a derailment accident, defeating diversity. 215 U.S. 308, 315 (1909). The out-of-state railroad admitted that the in-state railroad was its lessor, and therefore that the railroads would be jointly liable for certain acts, but nonetheless asserted that "the charge of joint negligence against the lessor and lessee in causing the wreck . . . was made only for the [purpose of preventing the removal] and was fraudulent and knowingly false." *Id.* This Court held that the "mere epithet 'fraudulent' in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability, the plaintiff has an absolute right to elect, and to sue the tortfeasors jointly if he sees fit, no matter what his motive." *Id.* at 316.

As was true in *Southern Railway* and *Cockrell*, the Court was *not* deciding whether the plaintiff could establish a cause of action against the in-state defendant. Indeed, the out-of-state defendant *accepted* that the plaintiff had a valid cause of action against the in-state defendant based on joint and several liability, and disputed only the underlying factual allegations of the claim. *Sheegog* does not involve a contention that a plaintiff fraudulently joined an in-state defendant based on the plaintiff's inability to state a valid claim against that defendant. Even more clearly, *Sheegog* does not involve a contention that the "common defense" exception to the rule of fraudulent joinder would apply.

Purporting to interpret this Court's ancient precedent, particularly *Cockrell*, the Third and Fifth Circuits now make

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[1] Accordingly, as the discussion of *Cockrell* in the petition and in this reply brief makes clear, petitioner did not distinguish *Cockrell* solely on the ground that the out-of-state defendant was vicariously liable for the acts of the in-state defendants (Opp. 12 n.9), but for myriad other reasons.

an exception to the objective test for fraudulent joinder. But this Court's cases preceded the adoption of the exclusively objective test for fraudulent joinder and thus do not address its scope, let alone the further question whether a "common defense" exception exists. This Court's cases have been given inconsistent interpretations in the lower courts, and this Court should intervene to resolve the lower courts' confusion and disarray regarding the test for fraudulent joinder.

II. THE ISSUE PRESENTED IS RECURRING AND IMPORTANT, AND THE FIFTH CIRCUIT'S "COMMON DEFENSE" RULE IS WRONG.

Respondent appears to agree that the issue presented is recurring and important, but contends that the petition should not be granted because the "common defense" exception is not the subject of a conflict. Opp. 19. We showed above that this assertion is wrong and that respondent's inconsistent statements reveal that even she does not believe her own argument. See *supra* at 2. Thus, the substantial problems created by a conflict among the circuits on an important question of federal procedure arise here – the fundamental unfairness of a lack of uniformity and the unseemly forum shopping that inevitably follows. See Pet. 16-18.

Respondent also asserts that the decision below is "consistent with principles of judicial federalism" – in particular, the principle that "diversity jurisdiction must be construed narrowly to ensure that the proper balance of federal-state power is maintained." Opp. 19 (capitalization omitted). But, federal courts must exercise jurisdiction where they have it. See *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress"). And, federal courts have diversity jurisdiction when the in-state defendant is fraudulently joined. Respondent's federalism argument simply begs the real legal question which is the scope of the doctrine of fraudulent joinder, and

specifically whether there is a "common defense" exception to the fraudulent-joinder doctrine.

Moreover, the primary interest protected by diversity jurisdiction is the right of out-of-state defendants to receive a fair trial in a case filed by an in-state plaintiff. See *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-10 (1945). See also Brief of *Amici Curiae* Chamber of Commerce et al. at 7-9; Brief of *Amicus Curiae* American Association of Railroads ("AAR") at 2, 11-13. Even respondent agrees that an in-state defendant is fraudulently joined if the plaintiff cannot state a valid claim against that defendant for a reason not applicable to the plaintiff's claim against the out-of-state defendant. But the case for finding fraudulent joinder and enforcing diversity jurisdiction is even stronger when the plaintiff cannot state a valid claim against *any party* (as was the case here). In that circumstance, the plaintiff is likely to have joined the in-state defendant in the hope that the state court would be more inclined than a federal court to allow the in-state plaintiff's claim to go forward despite its lack of merit. See Brief of Chamber of Commerce et al. at 11, 12-15; Brief of AAR at 11-12.

In her last argument, respondent seems to contend that the petition should not be granted because the decision below was a "long-overdue attempt to clarify . . . and . . . confine" the fraudulent-joinder doctrine, although in the next breath she says that "after a brief moment of clarity," the Fifth Circuit "lapsed once more into loose construction of the doctrine." Opp. 21. Each of the Fifth Circuit cases cited as "loose construction," however, simply applies *Smallwood*, albeit in ways that respondent does not like.[2] But, respondent is no

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[2] *See Rainwater* v. *Lamar Life Ins. Co.*, 391 F.3d 636, 638 (5th Cir. 2004) (per curiam) ("[t]his case turns . . . on whether the limitations defense that disposes of all claims against in-state defendants in fact disposes of all claims against all defendants, as the principle of *Smallwood* is triggered only when all defendants are reached"); *Ross* v. *Citifinancial Inc.*, 344 F.3d 458, 463-64 (5th Cir. 2003) (in a decision before *Small-*

doubt correct that *Smallwood* will generate confusion, and that confusion will have significant undesirable consequences. As one commenter explained, the "common defense" rule raises more questions than it answers:

> [D]ifficult situations would arise if numerous defenses applied to the in-state defendant, only one of which was "common" to the diverse defendant, or if there were evidence that the diverse defendant with whom the in-state defendant shared the common defense might have been joined in bad faith as well. In both of these cases, the principles of the "common defense" doctrine could be applied only after extensive analysis of all claims, creating a high risk that the merits will be decided during the determination of jurisdiction. [*Recent Cases*, *supra* at 1093 (footnote omitted).]

Equally to the point, the "common defense" rule returns the federal courts to the bad old days of lengthy inquiries in removal proceedings. Thus, the "new analysis suffers from the disadvantages of both the direct inquiry [into subjective motive] and the proxy rule [the objective test]: it does not speak to the simple, objective impropriety of a plaintiff's claim, but neither does it provide the flexibility to adapt to all indications of subjective fraud." *Id.*

CONCLUSION

For the reasons set forth in the petition and in this reply brief, the petition for certiorari should be granted.

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wood, finding fraudulent joinder based on a limitations defense with no mention or decision of a claimed "common defense" exception), *reh'g en banc denied* (Jan. 25, 2005); *Adams* v. *Duff*, 2004 WL 3103778, at *3-*5 (E.D. Ky. Dec. 8, 2004) (recognizing *Smallwood* as governing authority but holding that it does not apply because the statute of limitations defense was not "common" as to all defendants).

Respectfully submitted,

CHARLES TERRY OZIER
WILLIAM B. LOVETT, JR.
WISE CARTER CHILD & CARAWAY, PA
401 East Capitol Street
Post Office Box 651
Jackson, Mississippi 39205
(601) 968-5500

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

KELLY D. SIMPKINS
WELLS MARBLE & HURST PLLC
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(601) 355-8321

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